

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARNELL WILEY MILLS,

Defendant-Appellant.

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UNPUBLISHED

February 23, 1999

Nos. 197428; 208500

Macomb Circuit Court

LC No. 95-002862 FC

Before: Talbot, PJ., and Neff and Smolenski, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was originally sentenced to consecutive terms of twelve to forty years' imprisonment for armed robbery and two years for felony-firearm.

On defendant's motions for new trial based on ineffective assistance of counsel and for resentencing, this Court remanded the matter to the trial court. An evidentiary hearing was held, and the court denied the motion for new trial, finding that trial counsel was not ineffective and that defendant was not prejudiced by his representation. However, in light of potentially inaccurate information presented at the first sentencing hearing, the court determined that defendant should be resentenced. Defendant was resentenced to ten to twenty years' imprisonment on the armed robbery conviction, and two years' imprisonment on the felony-firearm conviction. He now appeals as of right, and we affirm.

I

On appeal, defendant first argues that he was denied effective assistance of counsel because his trial counsel failed to move to suppress an inculpatory statement made to the police after his arrest, and failed to object to the admission of the statement at trial. In addition, defendant claims that his trial counsel was ineffective because he failed to appear at defendant's original sentencing hearing which resulted in the trial court imposing a greater sentence than warranted. We disagree.

Effective assistance of counsel is presumed; therefore, the defendant bears a heavy burden of proving otherwise. *People v Plummer*, 229 Mich App 293, 308; 581 NW2d 753 (1998). In order to establish a claim of ineffective assistance of counsel, a defendant must show (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 307. A defendant must also overcome the presumption that the challenged action or inaction was trial strategy. *People v Leonard*, 224 Mich App 569, 592; 569 NW2d 663 (1997).

A

With respect to defendant's claim that counsel was ineffective because he failed to move to suppress his inculpatory statement, the record reveals that such a motion would have been denied. Accordingly, defendant was not prejudiced by counsel's omission.

Pursuant to defendant's motion for new trial, the trial court held a *Ginther*<sup>1</sup> hearing to determine the validity of the ineffective assistance of counsel claim. During the proceeding, the court essentially conducted a mini *Walker*<sup>2</sup> hearing to determine whether defendant's statement was properly admitted. After a thorough examination of the record and upon hearing additional testimony from witnesses on the matter, the trial court concluded that defendant's statement was voluntary, intelligent, and knowingly made to the police after a valid waiver of his *Miranda*<sup>3</sup> rights.

We concur in the trial court's ruling because we are not persuaded by defendant's argument that he was too ill at the time of the interview to provide a voluntary and intelligent statement. Defendant's claim that he was still suffering the effects of being sprayed by mace and could not focus on the interview is contradicted by the fact that he did not inform the officer that he was not feeling well; nor did he request medical attention or ask that the interview cease. We find the officer's explanation for defendant's physical gestures during the interview, that he was nervous and anxious, more plausible.

We also reject defendant's contention that the officer in charge made him promises of leniency in exchange for his statement, resulting in the involuntary statement. Although the officer testified that at the interview he may have stated to defendant that he would help him out if defendant cooperated by telling the truth, we are not convinced that the purported statement amounted to an offer of leniency. See *People v Conte*, 421 Mich 704, 750; 365 NW2d 648 (1984). More importantly, we are not persuaded that such a statement, if made, was understood by defendant as a promise of leniency, and that he subsequently relied upon it in confessing. *Id.* at 740-741. Under the totality of the circumstances, we find that defendant's statement was voluntary, intelligent and knowingly made.

Because the record fails to support defendant's assertion that a motion to suppress would have been successful, we cannot conclude that defense counsel's performance in this regard fell below an objective standard of reasonableness or that the representation prejudiced defendant.

## B

We likewise reject defendant's argument that trial counsel was ineffective for failing to appear at defendant's original sentencing hearing. The prosecutor's erroneous accusation of defendant's trial misconduct was subsequently recognized by both the prosecutor and the court, and resentencing was granted. Therefore, because the court properly remedied the situation by resentencing defendant on the basis of accurate information, his claim of ineffective assistance of counsel is moot.

## II

Defendant next argues that the trial court abused its discretion in admitting into evidence the transcript of the videotape of his interview with the police, and in permitting the jurors to review the transcripts while they viewed the videotape. This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

We agree with defendant that the trial court failed to comply with the procedures set forth in *People v Lester*, 172 Mich App 769, 774; 432 NW2d 433 (1988), to ensure the accuracy of the transcript. We are particularly troubled by the officer's admission that he filled in various inaudible portions of the transcript based on his recollection of the interview. Insofar as the trial court failed to properly ensure that the transcript was accurate and reliable, the court abused its discretion in admitting the transcript at issue and permitting the jury to review it during the playing of the videotape.

This does not end our inquiry, however, because we find that the court's error was harmless. MCR 2.613; MCL 769.26; MSA 28.1096. An error is harmless if it is highly probable that, in light of the strength and weight of the untainted evidence, the inadmissible evidence did not contribute to the verdict. *People v Mitchell*, 231 Mich App 335, 339; 586 NW2d 119 (1998).

Here, each juror was provided with a transcript immediately prior to viewing the video. The lights in the courtroom were dimmed and the court instructed the jury to focus on the videotaped interview rather than the transcript. Immediately after the conclusion of the videotape, the transcripts were collected and the jury did not view them again during trial or deliberations. Thus, it is highly unlikely that the jury even read the transcripts, and even less likely that they relied upon them in rendering the verdict. Because we are not convinced that defendant was prejudiced by the admission of the transcripts, or that the outcome of the trial would have been different absent their admission, we decline to reverse defendant's conviction on this basis.

We further reject defendant's argument that the trial court abused its discretion by discharging the court reporter's obligation to transcribe the videotape into the record as it was being played in court. We recognize that in order to preserve an issue for appellate review, the party raising the objection must provide this Court with a complete and accurate transcript of the lower court proceedings. *People v Anderson*, 209 Mich App 527, 535; 531 NW2d 780 (1995). The reason behind this rule is that

without a transcript, this Court is unable to review the party's objection and the trial court's reasons for its decision.

Here, however, the policy behind the rule does not apply because the video itself was admitted into evidence. Therefore, despite the absence of the transcript of the videotape, we are able to review defendant's claim of error regarding the videotape. Moreover, the trial court's consideration of the videotape, and its findings based upon the admission of that evidence, were clearly recorded in the lower court transcript for our review. Accordingly, we find no error in the trial court's determination that the court reporter was not required to transcribe the videotape as it played for the jury.

### III

Defendant next argues that his original sentence was based on inaccurate information and that it should be vacated and the matter remanded for resentencing based on proper information. After defendant filed his claim of appeal, and submitted his brief on appeal, the trial court granted defendant's motion for resentencing, and he was resentenced. Defendant's claim of error regarding sentencing is therefore moot.

### IV

Next, defendant argues that the trial court abused its discretion in admitting opinion testimony from an officer concerning defendant's attempt to flee the scene upon his arrest, and testimony from another officer regarding a spent bullet found on defendant at the time of his arrest.

#### A

First, defendant argues that Officer Cona should not have been permitted to testify that defendant attempted to run at the time of his arrest, and that such conduct is typical of an individual who is guilty of the charged offense. Evidence of flight is generally admissible because it may indicate a consciousness of guilt. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). Here, it was not an abuse of discretion for the trial court to permit the officer to testify that defendant attempted to flee from the scene at the time of his arrest, particularly in light of the other direct and circumstantial evidence that established defendant's participation in the robbery. See *People v Clark*, 124 Mich App 410, 413-414; 335 NW2d 53 (1983).

Regarding the officer's testimony that, in his opinion, defendant's attempt to flee was typical of a person who was guilty of the offense for which he was being arrested, we find that any error was harmless in light of the other properly admitted evidence of defendant's guilt. *Mitchell, supra*.

#### B

Defendant also argues that Officer Soulliere's testimony concerning the spent bullet found on defendant's person at the time of his arrest should not have been admitted because there was no evidence that the handgun was fired during the robbery. We reject defendant's argument because Soulliere merely testified that, based on his experience and knowledge, the bullet was of a type that

could be used in the firearm retrieved from the vehicle at the time of the arrest. This evidence, along with defendant's statement to police and other eyewitness testimony, connected defendant to the weapon recovered from the armed robbery and established an essential element in both the armed robbery and felony-firearm charges (i.e. that defendant carried a weapon). We find no abuse of discretion in the trial court's determination here.

#### IV

Lastly, defendant argues that the trial court abused its discretion at sentencing by misscoring the guidelines on offense variable 9, and by imposing a disproportionate sentence. We disagree.

A challenge to the scoring of the guidelines variables states a cognizable claim on appeal only where (1) a factual predicate is wholly unsupported, (2) a factual predicate is materially false, and (3) the sentence is disproportionate. *People v Raby*, 456 Mich 487, 4970499; 572 NW2d 644 (1998), *People v Mitchell*, 454 Mich 145, 176-177; 560 NW2d 600 (1997). Although we are convinced that the evidence presented at trial was sufficient to establish that defendant was the leader of the crime, in light of the discussion below, defendant's challenge to the scoring of the guidelines does not state a cognizable claim for relief. Accordingly, we decline to further address the merits of his argument.

We next turn to defendant's argument that his sentence was disproportionate and that the court's decision to exceed the guidelines was an abuse of discretion because the factors cited by the court were not entirely accurate and were not so severe as to warrant the sentence imposed. We disagree.

A trial court's imposition of sentence will not be disturbed unless the sentence does not reasonably reflect the seriousness of the circumstances surrounding the offense and the offender. *People v Castillo*, 230 Mich App 442, 447; 584 NW2d 606 (1998). Although the sentencing guidelines must be considered, compliance with the recommendation in the guidelines is not compelled. *Mitchell*, *supra* at 174-175. Indeed, the test of proportionality is whether a sentence reflects the seriousness of the crime, not whether the sentence departs from the guidelines. *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995).

After a careful review of the record, we find that defendant's conduct both during the commission of the crime and upon arrest justifies a sentence that exceeds the guidelines. The violent offense was a deliberate and contrived scheme in which defendant and the others blatantly disregarded the seriousness and gravity of their conduct. The fact that defendant displayed a fully loaded handgun during the crime served to enhance the fears and anxieties of the victim. Then, when apprehended by the police, defendant attempted to elude the officers by running away. When finally detained, defendant continued to struggle with the officers, resisting arrest to the point that two of the officers were thrown to the ground and one received an abrasion on her knee and ripped pants. We find further support for the sentence by the fact that defendant was placed on probation for a misdemeanor offense only two months prior to this incident. Hence, the sentence in excess of the guidelines was proper and necessary to protect society, further discipline defendant, and deter others from engaging in similar conduct.

Accordingly, we find that defendant's sentence was proportionate to the offense committed and his prior record.

Affirmed.

/s/ Michael J. Talbot

/s/ Janet T. Neff

/s/ Michael R. Smolenski

<sup>1</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

<sup>2</sup> *People v Walker*, 374 Mich 331, 132 NW2d 87 (1965).

<sup>3</sup> *Miranda v Arizona*, 384 US 436, 86 S Ct 1602, 16 L Ed 2d 694 (1966).